FILED
SEP 26 1951
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 351

JAMES M. ROBERTS and EVALINA L. ROBERTS,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOSEPH J. LYMAN,
1424 K Street, N. W.,
Washington 5, D. C.,
Counsel for the Petitioners.

JOSIAH LYMAN,
711 14th Street, N. W.,
Washington, D. C.

INDEX

	Page
Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit	1
Opinions below	1
Jurisdiction	2
Statement of the matter involved	2
Questions presented	6
Reasons for the allowance of the writs	6
Certificate of counsel	7
Brief in support of petition	9
Statutes involved	9
Facts	10
Argument	13
I. The trial court erred in denying motions for mistrial for improper impeachment of defense witness	13
II. The trial court committed error by reason of its inadequate instructions to the jury	15
III. The Court of Appeals by it *per curiam* opinion ignored this Court's interpretation of the "harmless error" statute	20
Conclusion	20
Appendix to brief	22

Cases Cited

62 Cases, More or Less, etc. v. *United States*, 71 S. Ct. 515	19
Campbell v. *United States*, 5 Cir. 167 F. (2d) 451, 453	7, 18
Chebethes v. *Price*, 59 App. D. C. 212, 37 F. (2d) 1008	15
Kenion v. *Gill*, 81 U. S. App. D. C. 96, 99, 155 F. (2d) 176	17

Page

Kotteakos v. *United States*, 328 U. S. 750, 66 S. Ct. 1239 ..... 7, 20
Liss v. *United States*, 2 Cir., 137 F. (2d) 995, 996 19
McAfee v. *United States*, 70 App. D. C. 142, 105 F. (2d) 21 17
Morris v. *United States*, 9 Cir., 156 F. (2d) 525, 527-536 ..... 7, 18
Radomsky v. *United States*, 9 Cir., 180 F. (2d) 781, 782-3 ..... 6, 7, 20
Remington v. *United States*, 2 Cir., — F. (2d) —, decided Aug. 25, 1951 7
Sandroff v. *United States*, 6 Cir., 158 F. (2d) 623, 630 ..... 7, 18
Sanford v. *United States*, 69 App. D. C. 45, 46, 98 F. (2d) 325 ..... 7, 14
Terzo v. *United States*, 9 F. (2d) 357, 358 ..... 7, 14
United States v. *Otto*, 2 Cir., 54 F. (2d) 277, 279 ..... 6, 20
Williams v. *United States*, 76 U. S. App. D. C., 299, 300, 131 F. (2d) 21 16

STATUTES AND RULES

United States Code, Title 26:
Section 2550(a) 4, 6, 9, 13, 19, 20
Section 2553(a) 2, 4, 6, 9, 13
Section 2554(a) 2, 4, 6, 9, 13
Section 2590(a) (1) and (2) 6, 9, 13
Section 2591(a) 2, 3, 6, 9
Section 2593(a) 3, 6, 9, 13
Section 3238(b) 3, 6, 9, 13, 19, 20

United States Code, Title 28:
Section 1254(1) 2
62 Statutes-at-Large 928 2
Rule 52(b), Federal Rules of Criminal Procedure 21

TEXTS

United States Pharmacopedia 12

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 351

JAMES M. ROBERTS and EVALINA L. ROBERTS,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

James M. Roberts and Evalina L. Roberts, petitioners, pray that a writ of certiorari issue to review the judgments of the Court of Appeals for the District of Columbia Circuit entered in this case (R. 100).

Opinions Below

The per curiam opinion of the United States Court of Appeals for the District of Columbia Circuit, decided April 5, 1951, has not been officially reported. It appears at page

99 of the Record. Appellants' petition for rehearing was denied August 29, 1951 (R. 109).

Jurisdiction

The opinion of the Court of Appeals was entered on April 5, 1951, its order denying petition for rehearing was entered August 29, 1951. The jurisdiction of this Court is invoked under Section 1254(1), Title 28, U. S. C., 28 U. S. C. A., 1254(1), 62 Stat. 928.

Statement of the Matter Involved

The petitioners are husband and wife. They were indicted jointly and separately in a total of four indictments (R. 7-11). The four indictments were consolidated for a single trial.

Three of the indictments charged petitioners with violations of Sections 2591(a) and 2593(b), Title 26, U. S. C. (R. 7, 8, 10). They were specifically charged with transferring taxable marihuana without having obtained a proper order form from the Collector of Internal Revenue. The indictments also charged them with transferring taxable marihuana without having paid the transfer tax (R. 7-8, 10).

Petitioner James M. Roberts was indicted for violations of Sections 2553(a) and 2554(a), Title 26, U. S. C. (R. 9). This indictment charged him with selling cocaine hydrochloride not in the original stamped package and also for failure to obtain a proper order form from the taxing authorities (R. 9-10).

At the trial the prosecution produced two witnesses, a narcotic agent and an informer (R. 31, 36). They gave the only testimony of the instances of the transfer of marihuana and cocaine by the appellants (R. 31A-42A). All of the activity took place on October 7 and 8, 1949 (R. 66, 68).

At all times during these two days a defense witness, Dorothy Martin, was present (R. 66-70). She heard all the conversations and was in the company of the appellants and the two prosecution witnesses during the time the alleged transfers of marihuana and cocaine-hydrochloride were supposed to have been made (R. 38-39, 66-70).

The prosecution was permitted, over strenuous objection of defense counsel, to question the defense witness Dorothy Martin concerning her arrest and indictment solely for impeachment purposes (R. 69-71). The petitioners called defense witness Martin to establish that the alleged marihuana that was being smoked during those two days could not have been marihuana at all. She stated that there were no pungent odors in the room (usually associated with burning marihuana), that although nearly everyone was smoking cigarettes in the party no one experienced or suffered any abnormal mental, emotional or intoxicating effects popularly associated with the use of marihuana (R. 66-68, 69). She also testified that appellant Evalina Roberts was driving her car in traffic in a normal fashion while smoking supposed marihuana cigarettes (R. 67-68). She stated that the only cigarettes being smoked or passed around in her opinion were popular brand cigarettes (R. 67). She further stated that there was no mention of cocaine-hydrochloride at any time despite the testimony of the informer to the contrary. The improper impeachment of this defense witness tended to negative the strong effect of her testimony for the defense.

The real issue in the case soon resolved itself into whether the marihuana offered in evidence by the prosecution met the test of taxable marihuana as defined in Section 3238(b), Title 26, U. S. C. (See Appendix). Only the transfer of marihuana so defined was taxable under the indicting statutes, Sections 2591(a) and 2593(a), Title 26, U. S. C.

Unless it met this test the Government's case must fail. The issue on the cocaine indictment against James M. Roberts boiled down to whether the cocaine-hydrochloride offered in evidence was derived from cocoa leaves as defined and required in Section 2550(a), Title 26, U. S. C. (See Appendix). Only derivatives of cocoa leaves are subject to the penalties under the indicting statutes, Sections 2553(a) and 2554(a), Title 26, U. S. C.

Section 2550(a), Title 26, U. S. C. is one of the statutes upon which the cocaine-hydrochloride indictment was based. That section is incorporated by reference in Section 2553(a), Title 26, U. S. C. (See Appendix).

The gist of the prosecution's cases were that the marihuana offered in evidence was that select part of the plant *Cannabis Satavia* which Congress deemed necessary to tax. The sharp issue was whether the stuff offered in evidence was in fact taxable marihuana or something else.

The cocaine capsules offered in evidence by the prosecution were alleged to have contained derivatives of cocoa leaves as required by Section 2550(a), Title 26, U. S. C. (R. 55, 56, 61). However, the possibility of it being the popular synthetic product derived from common substances exclusive of cocoa leaves brought the identity of the contents of the capsules into sharp issue (R. 55-64).

At the trial testimony of witnesses, the introduction of scientific texts and data and searching cross-examination of the Government's chemist brought the identity of these exhibits into sharp issue (R. 44-69, 71-76). The latter's qualifications as an organic chemist were sadly lacking and his findings lacked any degree of certainty (R. 44-66). At the close of the testimony there was considerable doubt as to whether the stuff in the Government exhibits could be characterized as taxable portions of the marihuana plant, as distinguished from nontaxable stalks, to warrant cover-

age by the taxing statutes which were the basis of the indictments. There was grave doubt from the inaccurate testing procedures of the Government chemist (R. 48-65) whether the alleged cocaine-hydrochloride was derived from cocoa leaves or from ordinary substances by popular synthetic methods. It is conceded that only the cocaine derived from cocoa leaves was intended to be covered by the indicting statutes.

At a bench conference between the Court and counsel prior to final arguments the whole matter of explaining the difference between taxable and nontaxable marihuana was discussed (R. 81-83). The difference between natural cocaine-hydrochloride derived from cocoa-leaves and the popular synthetic cocaines derived from common substances without cocoa-leaves was also discussed (R. 81-82). The Court insisted that no explanation need be given the jury as to the differences mentioned above (R. 81-83). The Court said that a reading of the definitions in the statutes themselves would be sufficient (R. 81-83). Defense counsel offered instructions which would aid the jury in choosing between the taxable and nontaxable marihuana and the natural (cocoa-leaves) cocaine and the popular synthetic product (R. 81-83). These instructions were all rejected by the Court (R. 18, 83). It was settled by the Court that the instructions to the jury on the technical phases of the testimony would receive nothing more than a reading of the provisions of the statutes (R. 81-83).

The Court's charge to the jury which must be read in its entirety discloses that the jury was left to grope with the stilted phraseology of numerous statutes as their only aid in reconciling sharply drawn issues on scientific subjects (R. 83-93). Whether or not the marihuana in evidence was the taxable kind and whether or not the cocaine-hydrochloride in evidence was derived from cocoa leaves deter-

mined the guilt or innocence of the petitioners. The Court's charge suggested a guilty verdict simply by its confusion.

The Court of Appeals affirmed the rulings of the District Court in every respect by its per curiam opinion (R. 99). The appeal below challenged the sufficiency of the evidence, the adequacy of the charges to the jury and numerous rulings of the Court in the course of the trial.

It is sufficient here to bring this Court's attention to the plain error made by permitting improper impeachment of an important defense witness and the inadequacy of the charges to the jury.

Questions Presented

1. Did the Circuit Court of Appeals err in sustaining the trial Court's ruling permitting the impeachment of a defense witness by the prosecution's inquiries concerning her arrest and indictment?

2. Did the Circuit Court of Appeals err in finding that the Court's charge to the jury on the issue of the identity of taxable marihuana and cocaine derived from cocoa leaves was adequate by a mere pedantic recitation without explanation of the formal indictments and reading of the provisions of Sections 2550(a), 2553(a), 2554(a), 2590(a), 2591(a), 2593(a), and 3238(b), Title 26, U. S. C.?

3. Did the errors above constitute plain error to warrant reversal?

Reasons for the Allowance of the Writs

1. The decision of the Circuit Court of Appeals sustains petitioners' convictions under a charge which was so vague and general that the jury was free to select such evidence as it chose to convict or acquit on circumstantial evidence alone which is contrary to law in Federal Courts. *United States* v. *Otto,* 2 Cir. 54 F. (2d) 277, 279; *Radomsky* v.

United States, 9 Cir. 180 F. (2d) 781, 782-3. Cf. *Remington* v. *United States,* — F. (2d) —, 2 Cir. decided August 25, 1951.

2. The decision which held the judge's charge to be adequate to sustain the convictions is in direct conflict with *Campbell* v. *United States,* 5 Cir. 167 F. (2d) 451, 453; *Sandroff* v. *United States,* 6 Cir. 158 F. (2d) 623, 630; *Morris* v. *United States,* 9 Cir. 156 F. (2d) 525, 527-532.

3. The decision confirming convictions despite the improper impeachment of a defense witness is contrary to the decisions of the United States Court of Appeals for the District of Columbia Circuit. *Sanford* v. *United States,* 69 App. D. C. 45, 46, 98 F. (2d) 325. The decision is contrary to *Terzo* v. *United States,* 8 Cir. 9 F. (2d) 357, 358 and cases cited therein.

4. The decision ignores this Court's construction of the "harmless error" statute in *Kotteakos* v. *United States,* 328 U. S. 750, 66 S. Ct. 1239 in that substantial rights of the petitioners were affected by the inadequate charge to the jury and the unlawful impeachment of the defendants' chief witness.

WHEREFORE, petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the District of Columbia Circuit, commanding that Court to certify and send to this Court, for its review and determination on a day certain to be therein named a full and complete transcript of the proceedings of said Court herein, being cases numbered and titled as follows: No. 10,535, Evalina L. Roberts, Appellant, *vs.* United States of America, Appellee; No. 10,536, James M. Roberts, Appellant, *vs.* United States of America, Appellee; No. 10,537, James M. Roberts, Appellant, *vs.* United States of America, Appellee; No. 10,538, James M. Roberts,

Appellant, *vs.* United States of America, Appellee; No. 10,539, Evalina L. Roberts, Appellant, *vs.* United States of America, Appellee, and that judgment therein rendered by said Circuit Court may be reviewed by this Court, and for such other relief as to this Court may seem proper.

Dated September 26th, 1951.

JOSEPH J. LYMAN,
Counsel for Petitioners.

Of Counsel:

JOSIAH LYMAN.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 351

JAMES M. ROBERTS and EVALINA L. ROBERTS,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent

BRIEF IN SUPPORT OF PETITION

Statutes Involved

The petitioners were convicted of violations of the Marihuana Tax Act, 26 U. S. C. 2591(a), 2593(a). Petitioner James M. Roberts was also convicted of a violation of the Harrison Anti-Narcotic Act, 26 U. S. C. 2553(a), 2554(a). The text of these statutes is fully set out in the Appendix to this brief.

The trial court, in addition to the foregoing statutes read the following to the jury in its charge:

26 U. S. C. 2550(a)

26 U. S. C. 2590(a)(1) and (2)

26 U. S. C. 3238, the full text of which are set out in the Appendix and are involved in this petition.

Facts

The petitioners were indicted and convicted of violations of various sections of the Internal Revenue Code listed under the next section of this brief titled "Statutes Involved."

James M. Roberts was sentenced to serve a term of 15 years. Evalina Roberts, a term of from 16 months to 4 years (R. 2-5).

On October 7 and 8, 1949, petitioners were visited by a friend, James Watson, who turned out to be an informer for a narcotic agent, Howard Chappell (R. 31, 36). Watson and Chappell claimed to have obtained some substance in cigarette form from petitioners which the prosecution claimed at the trial to be marihuana (R. 30, 31-34, 37-40). On October 8, 1949, Watson claimed to have obtained some capsules from petitioner James M. Roberts which were claimed at the trial to be cocaine-hydrochloride (R. 9-10, 31).

A defense witness, Dorothy Martin, was present in the combined company of Watson and Chappell and the petitioners on both days. It was on those two days that all of the transferring of the supposed narcotics took place. At the trial on cross-examination the prosecutor was permitted over objection to inquire about her arrest and indictment (R. 69-71). This unlawful impeachment served to discredit important testimony.

Later when the prosecution sought to introduce its exhibits as marihuana no one could positively identify it. The various narcotic agents tried and failed (R. 37). Likewise no one could identify the cocaine-hydrochloride as being a derivative of cocoa leaves although the narcotic agents tried. There was testimony from both sides that no one noticed pungent odors while the group (government agents, defendants and Dorothy Martin) were smoking cigarettes

indoors on those two evenings (R. 34-35, 42, 66-69). Likewise no one suffered dizzy spells, mental, emotional or physical effects despite the fact cigarettes supposed to contain marihuana were being smoked by all the witnesses and parties except James M. Roberts (R. 34-35, 66-69). Petitioner Evalina L. Roberts was singled out by the prosecution witnesses to have smoked several of these supposed marihuana-laden cigarettes prior to driving and while driving a car (R. 38, 41-42). There were no odors nor effects observed usually associated with marihuana, nor was her driving anything but normal (R. 34, 42, 66-69). The exhibits brought in by the narcotic agents as evidence were the butts of these half-smoked cigarettes (R. 30, 41).

The only witness upon whom the government could depend for identification of the exhibits was Albert Spear, a chemist (R. 44). His qualifications as an organic chemist were wanting (R. 45-48). By his own admission he had no background or knowledge of the subject of plant alkaloids. Marihuana and cocaine are members of the plant alkaloid family (R. 47). It has long been the practice in narcotic cases in this jurisdiction to accept the word of the chemist as to the identity of the substances brought into court. This was perhaps the first time that the inadequacy of the testing procedures was exposed (R. 48-65). The record discloses the prosecution's failure to provide convincing proof of the identity of narcotics upon which the government has based prosecutions and sent numerous persons to prison. Spear has made thousands of inadequate tests if his tests in this case are examples (R. 49).

The prosecution's chemist showed an amazing lack of familiarity with synthetic forms of narcotics which are popularized in our daily papers. Spear's excuse was that he did not read much (R. 46-48). On cross-examination, Chemist Spear made the emphatic statement that "as far

as I know there is no synthetic cocaine'' (R. 56-57). Yet the *Pharmacopedia of the United States,* which was in evidence, the contents of which federal courts take judicial notice (R. 57) differentiate natural cocaine derived from cocoa leaves and synthetic cocaine derived from other sources (R. 28, 57-58). Prosecution witness Spear admitted that the Pharmacopedia of the United States was an authority on the identification of drugs including cocaine (R. 46) yet the existence of synthetic cocaine escaped his notice for more than 31 years of testing in government laboratories (R. 44). He certainly could not make tests for the difference between natural and synthetic cocaines since the latter in his mind never existed. At the trial, chemist Spear learned for the first time that most cocaine used for drug purposes is obtained by synthetic processes (R. 62), and that synthetic cocaines and their derivatives are covered by patents (R. 62). His insistence that the capsules contained cocaine-hydrochloride from cocoa leaves was pure guesswork (R. 55-64). He did not know how to test for a synthetic organic product by means of a polarimeter which the authorities describe as the only means of differentiating between a synthetic cocaine and a natural cocaine from cocoa leaves (R. 63-64).

The prosecution's chemist resorted to guesswork in attempting to differentiate between taxable marihuana (the leaves of *connabis satavia*) and the mature stalks, not taxed under the statute. See Section 3238(b), Title 26, U.S.C. (Appendix) (R. 48-55, 64-65).

At any rate if Spear's findings were to be given any criticism or credence the court failed to comment on it at anytime either during the trial or in its instructions at the conclusion of the case (R. 83). Prior to the instructions defense counsel pointed out the necessity for defining the taxable portions of the marihuana plant from the non-

taxable but was overruled by the court. Likewise the importance of stressing to the jury the fact that the cocaine in evidence must have been proved to have come from cocoa leaves was urged by defense counsel without success (R. 78-83). The court curtly stated that a reading of the statutes themselves was sufficient without explanation or paraphrasing. The defense instructions (R. 18) offered for clarification of the identity of the drugs were denied (R. 83).

The court then read the indictments to the jury. This was followed by some general instructions and then by a reading of Sections 2951(a), 2593(a), 2553(a), 2554(a), 2550(a), 2590(a)(1) and (2), 3238(b), Title 26, U.S.C. That constituted the whole charge to the jury (R. 83-94).

ARGUMENT

I

The trial court erred in denying motion for a mistrial for improper impeachment of defense witness.

The question is whether prejudicial error was committed when the prosecution was permitted over objection to cross-examine an important defense witness concerning her arrest and pending indictment.

The prosecution was permitted, over objection, to inquire, and an important defense witness, Dorothy Martin, was compelled to answer, concerning her arrest and pending indictment of being a transferee of marihuana in violation of the Internal Revenue Code (R. 69-71). The testimony of this witness, Dorothy Martin, for the defense, had it been free from erroneous impeachment, would have overcome the presumption of guilt imposed by the provisions of the statutes upon which these indictments were based. Her testimony in substance was that she was present at

all times when informer Watson and agent Chappell (the chief witnesses for the prosecution) visited with the defendants at their home and that the subject of narcotics was never discussed, nor were any transferred. She further testified that there was no evidence of odors usual when marihuana burns or intoxicating effects suffered by any of the witnesses commonly and usually associated with smoking marihuana. The failure and refusal of the trial court to sustain defense objections to the prosecutor's inquiries about the arrest and indictment of the defense witness Martin was plain error, sufficient in itself to warrant reversal. The Court below has held that such action was reversible error. To cite one instance, *Sanford* vs. *United States,* 69 App. D. C. 45, 46:

> "It is improper, for impeachment purposes, to show accusation, arrest, or indictment, as well against the accused in a criminal trial as against a witness in any case, civil or criminal."

Numerous cases were cited, in support of the court's opinion. In the *Sanford* case, at page 46, the court further said:

> "We have restated this fundamental rule of evidence only in the hope that the District Attorney may bring it definitely to the attention of his assistants. Its breach, which we have had occasion to comment upon before, should not occur again."

In *Terzo* vs. *United States,* 9 F. (2d) 357, the defendant was convicted for violation of the National Prohibition Act. A witness for the defendant testified on direct examination that defendant was working for him miles from the place where the offense was alleged to have taken place. On cross-examination the prosecution was allowed, over objection, to inquire of the witness whether he had not been

arrested for having a still in his possession and that he was presently on bond. The court held that this was improper cross-examination and not the proper way in which to attack the credibility of the witness. It was prejudicial error sufficient to warrant a reversal of the judgment of conviction and the award of a new trial.

The court below has held in civil cases that an attempt to impeach a witness by showing that he was indicted for forgery, without conviction, was prejudicial error. *Chebithes* vs. *Price,* 59 App. D. C. 212.

The record in this case furnishes no room for holding that this error was harmless.

II

The trial court committed plain error by reason of its inadequate instructions to the jury.

The question is whether the charge to the jury was so inadequate as to constitute a denial of due process of law.

The court commenced its charge to the jury in a general way. This was followed by a word for word reading of each of the indictments. The court then read several instructions. This was followed by a reading of some eight or ten cumbersomely worded statutes from the Internal Revenue Code which had a bearing on the offenses charged. The defense counsel had previously discussed with the court the desirability of giving specific instructions defining marihuana and cocaine and the degree of proof required by the government to establish guilt (R. 78-80, 81-83). The court denied the instructions requested by the defendants and stated that a reading of the statutes would be sufficient. (R. 81-83).

The attitude of the court was such as to indicate that it would be futile to again request that the court be more specific in its instructions as it had already taken the position

that a reading of the statutes was sufficient to inform the jury.

The basic defect of the charge was the failure to discuss and define the offenses included within the indictments. *Williams* vs. *United States*, 76 U. S. App. D. C. 299, 300; 131 F. (2d) 21. To insist that a jury be informed what proof was necessary to constitute the identity of marihuana and cocaine and to explain the meaning and purpose of the various sections of the Internal Revenue Code and to apply the evidence adduced at the trial to the various counts of the indictments were, in the eyes of the law, not to demand a meaningless ritual. The average man has some idea of the subject of taxes and perhaps a nodding acquaintance with drugs and narcotics through his doctor's prescriptions, but to expect a jury to make a finding that the presumption of innocence is overcome in the fact of these generalized instructions was an insurmountable task. We merely insist that the judgment of the jury be an informed judgment and made under the safeguards of correct procedure. *Williams* vs. *United States*, supra. Since the crimes charged here with their constituent elements were not defined, the jury could not possibly have applied the reasonable doubt instruction given by the court. Furthermore, the charge as a whole gave the impression of a tacit assumption that some kind of guilty verdict should have been returned.

To hold this charge sound would be to assume that the jurors were wise in science and law; it would be to assume that they understood chemistry and physiology; that they understood the constituent elements of the offense of possessing and transferring narcotics without paying the required taxes; that they would know all the circumstances under which a verdict of not guilty was proper; and that they would know the proper application of the reasonable doubt criteria. It is almost if not as important to a de-

fendant to have a jury instructed on the law applicable to his particular case by the Judge, who knows the law, as to have a jury of his peers. The latter is supposed to safeguard our institution of fair trial by insuring impartiality. But what is the value of an open mind if it does not know with clear instructions the issues upon which it is to pass judgment. The jury, a group of reasonable citizens, is entitled to proper instructions if it must accept the duty of passing upon the life and liberty of our citizens. The law requires it. *Williams* vs. *United States, supra.*

It is reversible error for the trial court to fail to define the various crimes involved in the indictments and to fail to define the elements of each, to the extent necessary to permit the jury to apply the law to the facts. *Kenion* vs. *Gill,* 81 U.S. App. D.C. 96, 99, 155 F. (2d) 176; *Williams* vs. *United States, supra.*

It is the duty of the trial court to be meticulous in its treatment of every case which cames before it and to withstand the temptation to avoid the tedium of repeating to jurors that which the court may feel they already know. The omission may create an erroneous impression. *Kenion* vs. *Gill, supra.*

While some reliance may be placed by a trial Judge upon the capacity of a jury to understand the implications of instructions, nevertheless, both of the parties to the cause are entitled to have the jury clearly informed on the whole of the instructions as to the law covering their respective theories of the case. *McAfee* vs. *United States,* 70 App. D.C. 142, 105 F. (2d) 21. The jury is an untrained body and it is the duty of the court to make as clear as possible just what the law is. *McAfee* vs. *United States, supra.*

To leave the jury in a state of uncertainty after the charge has been held reversible error. *Campbell* vs. *United States,* 167 F. (2d) 451. It was said:

> "An examination of the charge as to Count 1 of the indictment shows that it constitutes chiefly a reading by the court to the jury of all of Section 301 and of Count 1. Not a word is said as to exactly what is charged in the count, nor of what proof is necessary under it. We think this amounts to there having been virtually no charge, and, therefore, there is reversible error."

Again in *Sandroff* vs. *United States,* 158 F. (2d) 623:

> "The court erred in failing to charge the jury concerning the application of the narcotic statutes to the facts. Nowhere did the court explain the provisions of the statutes with which the defendants were charged with violating."

The court in *Morris* vs. *United States,* 156 F. (2d) 525, went into the question of the inadequacy of the charge at great length and cited historical authority in support of its reversal of the conviction:

> "Where the instruction of the court is based upon a statute which is sufficiently clear, the judge may set forth the statute in the instruction, otherwise, he should explain it in other language in order that the jury may have a clear understanding of the law before applying it to the facts."
>
> • • • • • • •
>
> "The charge to the jury should not leave the jurors in ignorance or leave them to conjecture as to what constitutes the defense charged."
>
> • • • • • • •

"An instruction which does not state any proposition of law or only states the result of the law's application is erroneous."

"The court must define the offense charged in clear and precise language and not merely make reference to the indictment and to the statutes involved."

• • • • • • •

"The jury may not justifiably find a verdict until they are instructed on the law sufficiently to show them what is necessary for proof."

This Court has said time and again that in construing a statute the Court must construe what Congress has written and cannot add, subtract, delete or distort words used. *62 Cases, More or Less, Each Containing 6 Jars of Jam, et al.* v. *United States,* 71 S. Ct. 515. The trial court by its general instruction ignored the issue in the case in failing to differentiate for the jury cocaine derived from cocoa leaves defined in Section 2550(a), Title 26, U.S.C. (See Appendix) and other forms of cocaine drugs on the market. The court added all types of drugs to the coverage of the statute by its general instruction. The Second Circuit has said that the making of synthetic morphine is not an offense because the statute outlaws only derivatives of opium and cocoa leaves. *Liss* v. *United States,* 2 Cir., 137 F. (2d) 995, 996. The limitations of Section 2550(a), Title 26 U.S.C. should have been made clear to the jury by the Court in its charge.

Likewise the limitations of Section 3238(b), Title 26 U.S.C. defining taxable marihuana (See appendix) should have been clearly explained to the jury. We find nothing by way of definition of cocaine from cocoa leaves or taxable marihuana as differentiated from the mature stalks of the plant *Cannabis Satavia* other than a recitation of the

stilted language of Section 2550(a) and Section 3238(b), Title 26, U.S.C. (Appendix). The jury's verdict of guilt presupposes that they had made some definition of their own as to what constituted the taxable portion of the plant *Cannabis Satavia* and whether the capsules in evidence in fact contained cocaine derived from cocoa leaves.

The vagueness of the charge permitted the jury to select such evidence as they chose as proof of guilt and they were free to convict on circumstantial evidence alone which is not the law in federal courts. *United States* v. *Otto,* 2 Cir. 54 F. (2d) 277, 279; *Rodomsky* v. *United States,* 9 Cir. 180 F. (2d) 781, 782, 783.

III

The Circuit Court of Appeals by its per curiam opinion ignored this Court's interpretation of the "Harmless Error" statute.

To permit a chief defense witness to be improperly impeached particularly when her testimony tended to relieve the petitioners from the presumption of guilt imposed by the indicting statutes can hardly be considered harmless error particularly when the case was a close one on the evidence.

This together with the vague and indefinite charge to the jury was sufficient to "affect the substantial rights of the accused." See *Kotteakas* v. *United States,* 328 U.S. 750, 66 S. Ct. 1239.

To have sustained the improper impeachment and sustained the charge to a jury of laymen on the issue of the identity of drugs by reading technically worded statutes, the Circuit Court of Appeals condoned a wrong intended

to be relieved by Rule 52(b), Federal Rules of Criminal Procedure. *Kotteakas* v. *United States, supra.*

Conclusion

The Writ of Certiorari should be granted.

Respectfully submitted,

JOSEPH J. LYMAN,
Counsel for Petitioners.

Of Counsel:
JOSIAH LYMAN.

APPENDIX TO BRIEF

Statutes Upon Which Indictments Were Based

Title 26, Section 2591. ORDER FORMS

(a) *General Requirement.* It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 3230 and 3231, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary. * * * 53 Stat. 280, amended Mar. 8, 1946, c. 81, Sect. 10(a), 60 Stat. 40.

Title 26, Section 2593. UNLAWFUL POSSESSION

(a) *Persons in General.* It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 2590(a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the collector, to produce the order form required by section 2591 to be retained by him, shall be presumptive evidence of guilt under this section and of liability for the tax imposed by section 2590 (a). * * * 53 Stat. 281.

Title 26, Section 2553. PACKAGES

(a) *General Requirement.* It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie

evidence of liability to such special tax. * * * 53 Stat. 271, amended July 1, 1944, c. 377, Sect. 2, 58 Stat. 721.

Title 26, Section 2554. ORDER FORMS

(a) *General Requirement.* It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550(a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary. * * * 53 Stat. 272.

Additional Statutes Upon Which Court's Charge to Jury was Based

Title 26, Section 2550. TAX

(a) *Rate.* There shall be levied, assessed, collected, and paid upon opium, isonipecaine, cocoa leaves, opiate, any compound, salt, derivative, or preparation thereof, produced in or imported into the United States, and sold, or removed for consumption or sale, an internal revenue tax at the rate of 1 cent per ounce, and any fraction of an ounce in a package shall be taxed as an ounce. The tax imposed by this subsection shall be in addition to any import duty imposed on the aforesaid drugs. * * * 53 Stat. 269, amended July 1, 1944, c. 377, Sect. 1, 58 Stat. 721; Mar. 8, 1946, c. 81, Sect. 2, 60 Stat. 39.

Title 26, Section 2590. TAX

(a) *Rate.* There shall be levied, collected, and paid upon all transfers of marihuana which are required by section 2591 to be carried out in pursuance of written order forms taxes at the following rates:

(1) *Transfers to special taxpayers.* Upon each transfer to any person who has paid the special tax and registered under sections 3230 and 3231, $1 per ounce of marihuana or fraction thereof.

(2) *Transfers to others.* Upon each transfer to any person who has not paid the special tax and registered under

sections 3230 and 3231, $100 per ounce of marihuana or fraction thereof. * * * 53 Stat. 279.

Title 26, Section 3238. DEFINITIONS

* * *

(b) *Marihuana.* The term "marihuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin; but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination. * * * 53 Stat. 387.

INDEX

	Page No.
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Argument	11
Conclusion	17
Appendix	18

CITATIONS

Cases:

Affronti v. *United States*, 145 F. 2d 3	15
Alford v. *United States*, 282 U. S. 687	16
Caminetti v. *United States*, 242 U. S. 470	15
Coates v. *United States*, 186 F. 2d 338	15
Maragon v. *United States*, 187 F. 2d 79, certiorari denied, 341 U. S. 932	15
Mallory v. *United States*, 126 F. 2d 192	16
Mississippi Power & Light Co. v. *Whitescarver*, 68 F. 2d 928	14
Reagan v. *United States*, 157 U. S. 301	16
Shields v. *United States*, 17 F. 2d 66	16
Shreve v. *United States*, 103 F. 2d 796, certiorari denied, 308 U. S. 570	15
United States v. *One Device, etc.*, 160 F. 2d 194	14
Union Pacific R. Co. v. *Yates*, 79 Fed. 584	14

Statutes:

The Marihuana Tax Act:

26 U.S.C. 2590(a) (53 Stat. 279)	18
26 U.S.C. 2591(a) (53 Stat. 280, as amended, 60 Stat. 40)	18
26 U.S.C. 2593(a) (53 Stat. 281)	19
26 U.S.C. 3230(a) (53 Stat. 385, as amended, 60 Stat. 40)	18
26 U.S.C. 3231(a) (53 Stat. 386, as amended, 60 Stat. 40)	18
26 U.S.C. 3238(b) (53 Stat. 387)	11, 15, 19

The Harrison Anti-Narcotic Act:

26 U.S.C. 2550(a) (53 Stat. 269, as amended, 60 Stat. 39)	11, 20

Statutes—Continued

	Page
26 U.S.C. 2553(a) (53 Stat. 271, as amended, 58 Stat. 721)	21
26 U.S.C. 2554(a) (53 Stat. 272)	21
26 U.S.C. 3220 (53 Stat. 382, as amended, 60 Stat. 39)	20
26 U.S.C. 3221(a) (53 Stat. 383)	20
21 U.S.C. 174 (38 Stat. 275, as amended, 42 Stat. 596, 43 Stat. 657)	21

Miscellaneous:

Henry, *The Plant Alkaloids* (4th ed., 1949)	10, 13
Jenkins and Hartung, *Chemistry of Organic Medicinal Products,* (3d ed., 1949)	9, 13
Paul Karrer, *on Organic Chemistry*	10
Pharmacopoeia of the United States (12th Rev.)	12
III Wigmore, *Evidence* (3d ed.)	16
Wood-Osol, *United States Dispensatory* (23d ed.), 325	13

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 351

JAMES M. ROBERTS AND EVALINA L. ROBERTS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the Court of Appeals (R. 99) is reported at 190 F. 2d 600.

JURISDICTION

The judgment of the Court of Appeals was entered on April 5, 1951 (R. 100), and a petition for a rehearing *in banc* (R. 101-108) was denied on August 29, 1951, by the court sitting *in banc* (R. 109). The petition for a writ of certiorari was

filed September 26, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether the trial court adequately instructed the jury as to the type of narcotics taxable under the Internal Revenue Law.

2. Whether it was reversible error for the trial court to permit the Government, over objection, to cross-examine petitioners' witness as to her arrest and indictment arising out of the same transactions, in order to show her interest in the outcome of the case on trial.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra,* pp. 18-22.

STATEMENT

Five indictments (R. 7-11; Tr. 657-658 *) were returned in the District Court for the District of Columbia, the various counts of which charged petitioners and two others, jointly and severally, with violations of the provisions of the Marihuana Tax Act (26 U.S.C. 2591(a), 2593(a), 53 Stat. 280, 281) and the Harrison Anti-Narcotics Act (26 U.S.C. 2553(a), 2554(a), 53 Stat. 271, as amended, 58 Stat. 721, 53 Stat. 272). Three of the indictments related to marihuana (R. 7-9, 10-11). The

---

* R. refers to the printed record and Tr. refers to the typewritten copy of the trial minutes, both of which have been filed with the Court.

first charged, in two respective counts, that petitioner Evalina Roberts, on October 7, 1949, within the District of Columbia, transferred to another a part of a marihuana cigarette not in pursuance of a written order of such person on a requisite form, and, as a transferee of marihuana, obtained one marihuana cigarette without having paid the tax required thereon (R. 7). The second indictment charged in the first two counts that petitioner James Roberts, on October 7, 1949, similarly transferred and obtained one marihuana cigarette; and in the last two counts, that on October 8, 1949, he similarly transferred and obtained four marihuana cigarettes (R. 8-9). The third indictment charged, in two respective counts, that on October 8, 1949, petitioners jointly, unlawfully transferred and obtained about 17 grains of marihuana within the District of Columbia (R. 10-11).[1]

The remaining two indictments (R. 9-10; Tr. 657-658) related to violations under the Harrison Anti-Narcotics Act. The fourth indictment charged, in two respective counts, that on October 8, 1949, within the District of Columbia, petitioner James Roberts and another[2] "purchased, sold, dispensed and distributed," a mixture of about six and three-fourths grains of cocaine hydrochloride and milk sugar, not in or from the original stamped

[1] The third and fourth counts contained in this indictment were dismissed prior to trial on petitioners' motion (R. 14-15; Tr. 686-689).

[2] A severance was granted as to co-defendant Kermit R. Craxton named in this indictment (R. 84-85; Tr. 10).

package; and that they "did sell, barter, exchange and give away" this mixture to a third person not in pursuance of the requisite written order from such person (R. 9-10). The fifth indictment contained two counts, which charged petitioner James Roberts and another[3] with the illegal purchase and concealment of a quantity of cocaine hydrochloride and cocaine sulphate (Tr. 657-658). The indictments were consolidated for trial and petitioners were tried together (Tr. 682). The jury found both petitioners guilty on all the counts of the first four indictments in which each was charged (as to James Roberts, the second, third and fourth indictment; as to Evalina Roberts, the first and third (R. 7-11; Tr. 673-676). It found petitioner James Roberts not guilty of the charges contained in the fifth indictment (R. 2-6; Tr. 675). James Roberts was sentenced to a term of 20 months to 5 years on each count of the relevant indictments, the sentences being concurrent with respect to the counts in a particular indictment, but consecutive with respect to the counts of the three relevant indictments (R. 3-5, 19-22). Evalina Roberts was sentenced to a term of 16 months to 4 years on each of the two relevant indictments, all terms on both indictments to run concurrently with each other (R. 2, 6, 18-19, 22-23). On appeal, the judgments of conviction were affirmed *per curiam* (R. 100).

The evidence introduced by the Government at

---

[3] A severance was granted as to co-defendant Jesse R. Jeffers, Jr., named in this indictment (R. 85; Tr. 38, 656-657).

the trial in support of the charges may be summarized briefly as follows:

Petitioners are husband and wife (R. 66). Watson, an informer, was an acquaintance of petitioner James Roberts (R. 31; Tr. 73-74). On October 7, 1949, accompanied by Chappell, a government narcotics agent, he visited at petitioners' residence in Washington, D. C., where a Mrs. Martin was also visiting at that time (R. 31-32, 34, 66-67; Tr. 82-83). There, in the course of a conversation which had drifted to the subject of narcotics,[4] Watson remarked that he did not have "any cocaine, or anything" with him (R. 32, 36-37). James Roberts, replying that he had some "reefers" or "pot," brought out a pile of marihuana on a hat-box lid, and invited those present to roll the substance into cigarettes and to smoke them (R. 32-33, 37; Tr. 92-93). Chappell took one of these cigarettes (R. 38, 41). This transfer is the basis of one of the indictments against James Roberts (R. 8-9).

After most of those present had smoked several marihuana cigarettes apiece, the party drove to a local night club. While driving, Evalina Roberts smoked half of a marihuana cigarette and gave

---

[4] In the course of the conversation Watson stated that he was staying at the Dunbar Hotel in Washington, whereupon James Roberts strongly advised him to get out of there lest he get himself into jail, adding that at one time he had some pure cocaine in there but lost it because the hotel detective would not be bribed so as to permit him to get the cocaine out of the hotel (R. 32, 36-37).

the remaining portion to Chappell, who pinched it out and put it in his pocket (R. 39, 41; Tr. 208). This transfer was the basis of one of the indictments against Evalina Roberts (R. 7).

The party returned to petitioners' house after midnight, because Watson and Chappell desired to obtain some more of the marihuana cigarettes (R. 33-34, 37-41; Tr. 88-92). At this time James Roberts again brought out marihuana on a hatbox lid from which Watson rolled four cigarettes, which Chappell put in his pocket (R. 40-41). This transfer is the basis of counts 3 and 4 of one of the indictments against James Roberts (R. 8-9).

The following afternoon, Watson and Chappell returned to petitioners' house, where some more marihuana cigarettes were distributed (R. 34-35, 42; Tr. 94-95, 214-215), and Watson purchased from James Roberts ten capsules of cocaine. This transaction was the basis of a third indictment against James Roberts (R. 9-10; Tr. 98-101, 214-219, 284, 429). Upon their departure, Evalina Roberts, at her husband's direction, poured some marihuana from a small bag into Watson's handkerchief (Tr. 101-104, 219-220). This transaction was the basis of another indictment against petitioners (R. 10-11).[5]

---

[5] After they left petitioners' house Watson handed the cocaine and the handkerchief with the marihuana to Chappell (Tr. 112-113, 222). Chappell testified that in his opinion, based on previous experience, the substance in the handkerchief, from its appearance and odor was marihuana (Tr. 212-213, 277-278), and that the other substance, from the taste-test given it, was cocaine (Tr. 236-237, 270-272, 296).

None of the transfers to Watson was in pursuance of any order forms issued by the Internal Revenue Bureau for the purchase of narcotics (Tr. 108-109, 117-118), nor were any federal stamps affixed to any of the narcotics (Tr. 114, 116, 117).

A chemist,[6] employed in the laboratory of the Internal Revenue Bureau for over 30 years in analyzing narcotics, testified that on the basis of analyses performed by him, the substances obtained from petitioners contained marihuana [7] and a mixture of cocaine hydrochloride and milk sugar (R. 44-45, 47-48; Tr. 358-359, 369-373), and that

---

[6] He was awarded an A.B. degree in chemistry by George Washington University in 1922 or 1923, and taught organic chemistry at that school for a couple of years and as a chemist for the Internal Revenue Bureau he had testified in practically every narcotics case that has been tried in the District courts since 1920 (R. 44-48).

[7] With respect to the marihuana, the chemist testified that a microscopic examination, which is the best test for the presence of marihuana, revealed that the substance contained parts of the leaves of a marihuana plant (R. 49-51, 65). He also testified that he had permitted seeds from the marihuana exhibits to sprout, thus indicating that the substance was marihuana and that the seeds were not sterilized (Tr. 394-395). Finally, after segregating the impurities from the exhibit by chloroform, which alone can extract marihuana, he subjected it to chemical analysis, employing the Duquenois agent (a universally accepted test), incorrectly spelled as "Degene" in the record (R. 49, 51, 52), which, due to the presence of cannabinol, an active resin in the marihuana plant, produces a color reaction which starts with slate, gradually turns to green and ends with blue (R. 49-52, 54). He admitted that cannabinol could possibly be present throughout the *cannabis sativa* plant including its stalk, but stated that the stalks give only a slight reaction to the chemical test, while the seeds give none at all (R. 54-55, 64-65). He concluded that from the examinations made the exhibits definitely contained parts of the leaves of the marihuana plant (R. 65).

cocaine hydrochloride is a derivative of coca leaves (R. 55; Tr. 375).[8]

Queried, on cross-examination, as to whether he eliminated the possibility that the cocaine in evidence was synthetically produced,[9] he stated that from his knowledge of the subject there was no synthetic cocaine, save novocaine (R. 56-57).

The defense then introduced in evidence page 137 of the *United States Pharmacopoeia*, which the chemist admitted was authoritative. A passage therefrom was read to the jury as follows (R. 57-

---

[8] With respect to the cocaine exhibits, he explained that he treated samples thereof with a Mayer's reagent (mercuric iodide test, incorrectly referred to as "Morris" in the record (R. 56)), and a Wagner reagent (an iodine solution), and that from a microscopic examination, he recognized the resulting alkaloid crystals (plantic chloride) as being cocaine, which was derived from coca leaves (R. 55-56).

[9] A pre-trial motion was filed by petitioners requesting an order for leave to examine the marihuana and cocaine which the Government proposed to introduce in evidence against them (R. 13-14). On December 16, 1949, during oral argument on the motion, petitioners' counsel requested that samples of the seized contraband be surrendered to their chemist for analysis, but the court ruled that it would grant the motion only to the extent of permitting petitioners' chemist access to the laboratory of the Bureau of Internal Revenue in order that he may analyze the narcotics there (R. 94-95). Subsequently, petitioners submitted proposed orders for the court's signature reciting therein that the Government be required to furnish them with "samples" of the narcotics obtained from them for chemical analysis with the limitation that the analysis be conducted in the laboratory of the Bureau of Internal Revenue (R. 28-30). The court refused to sign the proposed orders because they failed to comply with the terms of its ruling inasmuch as they called for the surrender to petitioners of "samples" of the narcotics, and because they lacked a certificate of service (R. 96-97). Petitioners' counsel never inquired as to the reason for the court's refusal to sign the orders and refused the prosecutor's proferred assistance to gain access to the Internal Revenue Bureau's laboratory facilities without a court order for a private analysis of the

58): 'Cocaine is an alkaloid obtained from the leaves of Erythroxylon Coca Lamarck and other species of Erythroxylon (Fam. Erythroxylaceae), or by synthesis from ecgonine or its derivatives." (R. 28.)

Subsequently, he testified that he believed, although not without some doubt, that methyl benzyl ecgonine and cocaine are chemically synonymous (R. 58, 60). When asked whether ecgonine could be synthesized without starting from the coca leaf, he replied that he didn't know (R. 58). He further stated that he did not know and had no opinion as to a statement contained in *Chemistry of Organic Medicinal Products,* by Jenkins and Hartung, which he recognized as an authority in the field, to the effect that succindialdehyde, methylamine and acetone, if mixed at room temperature, will yield tropinone, which, if mixed further with sodium and carbondioxide and treated with hydrogen, will result in ecgonine (R. 58-59). Finally, passages from three books which he agreed to be authoritative were read to him, indicating that cocaine can be produced synthetically, but he could express no opinion on the subject (R. 62-64).[10]

---

narcotics (R. 97). On January 11, 1950, which was the scheduled date for trial at the time of petitioners' motion for leave to examine the seized narcotics, petitioners were ordered to stand trial without having availed themselves of such an examination (R. 31, 96, 98; Tr. 587).

[10] The authorities referred to and the relevant passages read at the trial were as follows (Jenkins and Hartung, *Chemistry of Organic Medicinal Products,* p. 589):

> "Cocaine may be synthesized by the benzoylation of alcoholic hydroxyl group and methylation of the carboxyl group in ecgonine. Most of the cocaine used for drug

In testifying on petitioners' behalf, Dorothy Martin, who was present in petitioners' house when Chappell and Watson were there on October 7 and 8, 1949, stated that she did not note any pungent odors or notice anyone to be unusually excited or to suffer any ill effects, such as sickness, drowsiness or dizziness, supposedly associated with the smoking of marihuana. She also testified that Mrs. Roberts drove in a normal manner when she took her home on the evening of October 7. (R. 66-69.) In order to show her interest and bias in the outcome of the case, she was allowed to testify, on cross-examination, over objection, that she was a friend of Mrs. Roberts, and that she had been arrested and indicted in connection with the same transactions involved in this case (R. 69-71).

Petitioner submitted proposed instructions defining for the jury in non-statutory terms the nature of the narcotics taxable under the statute (R. 18). The trial judge stated that he thought the statutory definition clear (R. 82-83) and accord-

---

purposes is obtained synthetically in this manner." (R. 62.)

(Henry, *The Plant Alkaloids*, p. 99):

"Willstatter and Bode converted tropanone into ecgonine by treating sodium tropanone with carbon-dioxide and sodium, when it yielded sodium tropinone-carboxylate. This on reduction with sodium in alcohol gave some ecgonine, which on esterification with methyl alcohol and benzoylation yielded cocaine." (R. 62.)

(Paul Karrer, *on Organic Chemistry*, p. 833):

"A simpler and more elegant synthesis of tropine has been discovered by R. Robinson. It depends on the condensation of the succindialdehyde with acetone dicarboxylic ester and methylamine. These three substances,

ingly read the relevant statutes to the jury (R. 90, 92).

ARGUMENT

1. Petitioners contend (Pet. 15-20) that the court failed properly to instruct the jury on the elements of the offense in that it failed to make clear the difference between taxable marihuana, derived from the plant *cannabis sativa,* and its non-taxable stalks (see 26 U.S.C. 3238(b), Appendix, *infra,* p. 19) and the difference between cocaine, derived from coca leaves and synthetic cocaine (see 26 U.S.C. 2550(a), *infra,* pp. 20-21). They argue that they had raised an issue before the jury as to whether the marihuana and cocaine in evidence were such as were taxable under the statutes, and hence that it was improper for the court to define the taxable narcotics merely in the terms of the statute.

Petitioners' argument is predicated solely upon their attempts to discredit the Government's expert witness. The expert was a chemist with a college degree and teaching experience in organic chemistry. He had thirty years' practical experience in analyzing narcotics for the Internal Revenue Bureau. (R. 44-47.)

As to the marihuana exhibits, which he con-

---

mixed at room temperature, yielded, together with sodium carbondioxide, an ecgonine." (R. 64.)

and on page 836:

"Ecgonine laevo-rotary or dextro-rotary, sometimes known as pseudo ecgonine, treated with methyl alcohol and benzoic acid, or ester, will result in cocaine or methyl benzol ecgonine." (R. 64.)

cluded to be derived from the *cannabis sativa* plant, the expert testified that he made a microscopic examination of samples of the exhibit, and found them to contain parts of the leaves of a marihuana plant. This test for the presence of marihuana is the most reliable. (R. 49-51, 65.) In addition, his conclusion was verified by two other tests—by observation of the sprouting of the seeds from the marihuana exhibits, and by observing the exhibit's reaction to chemical analysis (Tr. 394-395; R. 49, 51, 52). Although admitting that cannabinol could possibly be present in the marihuana stalk, he testified that stalks have only a slight reaction to the chemical test, and that the reaction witnessed by him was determinative of the presence of leaves and not stalks. There was no evidence that the exhibits were anything other than marihuana leaves.

The chemist also testified to the chemical analyses to which he subjected the exhibit, which he concluded to be cocaine derived from coca leaves. He testified that he treated samples of the cocaine exhibit with two separate reagents, each of which produced alkaloid crystals, which he identified under a microscope as cocaine derived from coca leaves.[11] On cross-examination when the witness manifested his lack of knowledge as to the possibility of producing cocaine synthetically, various

[11] The *Pharmacopoeia of the United States* (12th Rev.), 137-138, describes three identification tests for the presence of cocaine and three out of four such tests for the presence of cocaine chloride, each of which tests, in positive cases, results in the formation of crystalline precipitates, identifiable under a microscope.

passages from text books on chemistry were read to him in order to elicit his opinion as to the correctness of the statements contained therein. The statements were to the effect that it was possible to produce cocaine synthetically from ecgonine.[12] However, while admitting the authoritative nature of the texts quoted, the witness did not express an opinion as to the correctness of the quoted passages, since he had no knowledge on the subject of synthetic cocaine. Petitioners did not present any expert to corroborate these statements. Consequently, the quoted excerpts, introduced in the form of questions to the witness, were left un-

---

[12] The texts relied upon by petitioners state that most commercial cocaine is derived, not from the alkaloids in coca leaves directly but from their organic acids, known as ecgonine. To this extent it may be said that most of the cocaine of commerce is a partially synthetic product. This synthesis is, however, dependent to some extent upon natural ecgonine, which could only be derived from the coca leaves.

The same text books indicate that while there has been some experimental production of synthetic cocaine from artificial ecgonine, such production has been chiefly limited to the experimental laboratories, because efforts to synthesize tropinone, from which ecgonine could be synthesized, have not proved too successful. Wood-Osol, *United States Dispensatory* (23d ed.), 325; Jenkins and Hartung, *Chemistry of Organic Medicinal Products* (3d ed., 1949), 589, 590-593; Henry, *The Plant Alkaloids* (4th ed., 1949), 79-81, 93, 95-98, 99-100, 111. Even in the limited experimentations leading to the production of "synthetic" ecgonine, Henry, at 95-98 indicates that the residue obtained in working up the secondary alkaloids of coca leaves usually has been utilized. Indeed, the excerpt from Jenkins and Hartung, 589, quoted by petitioners during the trial (R. 62), reads in its full context as follows:

"Cocaine may be synthesized by the benzoylation of the alcoholic hydroxyl group and methylation of the carboxyl group in ecgonine. Most of the cocaine used for drug purposes is obtained synthetically in this manner, the ecgonine being provided from the other naturally occurring cocaine bases."

proven and do not constitute evidence of the facts stated therein since it is settled law that scientific books and treatises are not admissible as independent evidence of the facts they purport to contain. *United States* v. *One Device, etc.*, 160 F. 2d 194, 198-199 (C.A. 10); *Mississippi Power & Light Co.* v. *Whitescarver*, 68 F. 2d 928, 930-931 (C.A. 5); *Union Pacific R. Co.* v. *Yates*, 79 Fed. 584 (C.A. 8).

Under these circumstances, petitioners failed to raise any real issue as to the taxable nature of the narcotics in evidence and there was no necessity for the court to give any special instructions with respect thereto beyond the definitions contained in the statute itself.

Moreover, in ruling on petitioners' request to charge on this issue the court stated that it found the statute clearer than the proposed instructions submitted by petitioners (R. 82-83). Thus, the court merely substituted the language of the statute for the language proposed by petitioners, but in reading the statutory definition it necessarily informed the jury that they must find the narcotics in evidence to be of the type covered by the statute. The cases relied upon by petitioners to show conflict with the decision of the court below with respect to the propriety of the instructions given (Pet. 7) are clearly distinguishable. Those cases did not arise under the narcotics statutes, and the instructions therein were given under entirely different circumstances.

The elements of the offenses charged were presented to the jury in statutory language, which used common terminology in their ordinary sense, and it was unnecessary for the court to go beyond the language of the statutes in order to enable the jury to make an intelligent application of the law to the facts. *Coates* v. *United States,* 186 F. 2d 338 (C.A. D.C.); *Affronti* v. *United States,* 145 F. 2d 3, 9 (C.A. 8); *Shreve* v. *United States,* 103 F. 2d 796, 812 (C.A. 9), certiorari denied, 308 U.S. 570. Nor was the trial court required to instruct the jury on the issues in the precise language requested by counsel. See *Maragon* v. *United States,* 187 F. 2d 79 (C.A. D.C.), certiorari denied, 341 U.S. 932.[13]

2. Petitioners contend that the trial court committed reversible error in allowing their witness to be cross-examined, over objection, concerning her arrest and pending indictment as a result of the same transactions for which petitioners were on trial. We submit that this contention is without

---

[13] The specific request to charge that petitioners be found not guilty "as to these indictments" unless they find that the marihuana exhibit came "from a part of the plant *cannabis sativa* other than the mature stalks thereof (R. 18), was clearly erroneous. The statute (26 U.S.C. 3238(b)) defines taxable marihuana as including products made from resin extracted from mature stalks. The proposed charge was also susceptible to the interpretation that if the marihuana came from both the leaves and the stalks, petitioners should be acquitted. Thus, the court properly refused this instruction and substituted a correct one, using the language of the statutory definition of marihuana. Cf. *Caminetti* v. *United States,* 242 U.S. 470, 485.

merit. The interrogation objected to was not designed to impeach the credibility of the witness merely by showing that she was arrested and charged with a crime as was the situation in the cases relied upon by petitioners (Pet. 7). Its announced purpose was to show the witness' interest in the outcome of the case and possible bias because of her connection with the transactions for which petitioners were on trial. It can easily be seen that one who is named a defendant in a pending indictment, which is predicated on the same transactions for which another accused is being tried, carries a strong temptation to exonerate the other accused and thus help one's own cause. Thus, the interest of the witness in the outcome of the cause was a circumstance to be shown, and, consequently, the questions posed to her had a definite relevancy, and were entirely proper. *Reagan* v. *United States,* 157 U.S. 301, 305; *Mallory* v. *United States,* 126 F. 2d 192 (C.A. 9); *Shields* v. *United States,* 17 F. 2d 66 (C.A. 3); see also III Wigmore on *Evidence* (3d ed.) 524, 527. Cf. *Alford* v. *United States,* 282 U.S. 687, 693.

CONCLUSION

No conflict of decisions or question of general importance is involved in this case. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
JAMES M. MCINERNEY,
Assistant Attorney General.
BEATRICE ROSENBERG,
EDWARD S. SZUKELEWICZ,
Attorneys.

NOVEMBER, 1951.

APPENDIX

STATUTORY PROVISIONS

The Marihuana Tax Act

26 U.S.C. 3230(a) (53 Stat. 385, as amended, 60 Stat. 40) provides in part as follows:

> Every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, prescribes, administers, or gives away marihuana shall (1) before engaging in any of the above-mentioned activities, and (2) thereafter, on or before July 1 of each year, pay the following special taxes respectively: * * *

26 U.S.C. 3231(a) (53 Stat. 386, as amended, 60 Stat. 40) provides:

> Any person subject to the tax imposed by section 3230 shall, upon payment of such tax, register his name or style and his place or places of business with the collector of the district in which such place or places of business are located.

26 U.S.C. 2590(a) (53 Stat. 279) provides in part as follows:

> There shall be levied, collected, and paid upon all transfers of marihuana which are required by section 2591 to be carried out in pursuance of written order forms taxes at the following rates: * * *

26 U.S.C. 2591(a) (53 Stat. 280, as amended, 60 Stat. 40) provides:

> It shall be unlawful for any person, whether or not required to pay a special tax and reg-

ister under sections 3230 and 3231, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary.

26 U.S.C. 2593(a) (53 Stat. 281) provides:

It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 2590(a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the collector, to produce the order form required by section 2591 to be retained by him, shall be presumptive evidence of guilt under this section and of liability for the tax imposed by section 2590(a).

26 U.S.C. 3238(b) (53 Stat. 387) provides:

The term "marihuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin; but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

The Harrison Anti-Narcotic Act

26 U.S.C. 3220 (53 Stat. 382, as amended, 60 Stat. 39) provides in part as follows:

> On or before July 1 of each year every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium, coca leaves, isonipecaine, or opiate, or any compound, manufacture, salt, derivative, or preparation thereof, shall pay the special taxes hereinafter provided. Every person upon first engaging in any of such activities shall immediately pay the proportionate part of the tax for the period ending on the following June 30.

26 U.S.C. 3221(a) (53 Stat. 383) provides:

> On or before July 1 of each year every person who engages in any of the activities enumerated in section 3220 shall register with the collector of the district his name or style, place of business and place or places where such business is to be carried on, and every person upon first engaging in any such activities shall immediately make like registration.

26 U.S.C. 2550(a) (53 Stat. 269, as amended, 60 Stat. 39) provides:

> There shall be levied, assessed, collected, and paid upon opium, isonipecaine, coca leaves, opiate, any compound, salt, derivative, or preparation thereof, produced in or imported into the United States, and sold, or removed for consumption or sale, an internal revenue tax at the rate of 1 cent per ounce, and any fraction of an ounce in a package shall be

taxed as an ounce. The tax imposed by this subsection shall be in addition to any import duty imposed on the aforesaid drugs.

26 U.S.C. 2553(a) (53 Stat. 271, as amended, 58 Stat. 721) provides:

> It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.

26 U.S.C. 2554(a) (53 Stat. 272) provides:

> It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550(a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.

---

21 U.S.C. 174 (38 Stat. 275, as amended, 42 Stat. 596, 43 Stat. 657) provides:

> If any person fraudulently or knowingly imports or brings any narcotic drug into the

United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall, upon conviction, be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 973840

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 351

JAMES M. ROBERTS AND EVALINA L. ROBERTS,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR REHEARING

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

On November 26, 1951, this Court denied petitioners' Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

They now petition the Court to rehear that original petition and reconsider the order of denial for cogent reasons not satisfactorily emphasized and made clear in their original petition. These reasons inescapably disclose a systematic denial of procedural due process of law to these petitioners, commencing with the trial court and continuing through the Circuit Court of Appeals to the very threshold of this petition. A basic reason to support this contention is that the Circuit Court of Appeals below wrote no opinion in affirming petitioners' conviction. This factor

alone would preclude the petitioners from procedurally "obtaining the ear" of this Court.

Petitioners limit their argument in this petition for rehearing to Question No. 2 raised in the Petition for Writ of Certiorari.[1] The particular question involved was the inadequacy of the Trial Judge's charge to the jury.[2]

Petitioners believe it essential to state that numerous questions of error were raised in the trial court. All are not sought to be reviewed here. Of these numerous errors a number were cited in the brief on appeal and argued in the Circuit Court below. Some of the questions argued below were novel, upon which no Court had heretofore rendered an opinion, and others would unquestionably have warranted reversal in the light of our Circuit Court's own decisions. Unhappily, the Circuit Court below disposed of the novel questions and ignored its own precedents without an attempt to distinguish this case from its learned opinions in similar criminal cases. This summary disposition was made on April 5, 1951, (R. 100):

> "We have examined the record and find no prejudicial error. The judgments of the District Court are accordingly affirmed."

That curt opinion following a hotly contested criminal trial lasting more than a week and compiling a huge record replete with error saved by timely exceptions and operation of the Federal Rules of Criminal Procedure, was an affront to the procedural safeguards accorded persons by the Fifth Amendment to the Constitution of the United States.

During the course of this trial and its appeal to the Circuit below, public opinion calling for the eradication of narcotic traffic and the jailing of narcotic peddlers had been

---

[1] See page 6 of Petition for Writ of Certiorari, and pages 15-20 thereof for argument on the question involved.

[2] Ibid.

crystallized through editorial comment and colorful press and television coverage of Congressional Crime Committee hearings. Unquestionably these exposés are having a salutary effect on the eradication of these evils. However, nothing that transpired could possibly alter the inescapable truth that the Circuit Court below would have had to resort to the most intricate and learned legalistic gymnastics to have written an opinion at length to affirm the conviction on the briefs and arguments presented and particularly in the face of its own precedents.[3] These cases struck down judgments of conviction when it appeared that the juries were not intelligently instructed.

The Circuit Court below could never in a written opinion have intelligently reconciled the charge of Trial Judge Letts (R. 83-94) with those opinions and still affirm the conviction here. It is pointed out that the United States in its briefs before the Circuit Court and even here in opposition to the petition for a Writ of Certiorari politely side-stepped the question of the adequacy or inadequacy of Judge Letts' charge to the jury. That question remained unanswered below and remains unanswered even up here by this Court's denial of petitioners' original petition. To date, the petitioners have had a public trial and that is all. Due process of law under the Fifth Amendment does not limit or preclude these defendants from appealing their convictions. Their appeal to the Circuit Court below was a matter of right and was in no sense discretionary. It would appear that the Circuit opinion below (R. 100) gave the Court discretionary power to write an opinion or not as it saw fit. Silence by a Court on Constitutional questions timely raised and earnestly argued does not constitute an

---

[3] *Kenion* v. *Gill*, 81 U. S. App. D. C. 96, 155 F. 2d 176; *Williams* v. *United States*, 76 U. S. App. D. C. 299, 131 F. 2d 21; *McAfee* v. *United States*, 70 App. D. C. 142, 105 F. 2d 21, cited and argued in Petition for Writ of Certiorari, 15-17.

opinion. The right of appeal implies that appellants' case is to be considered upon the questions of law raised in the light of precedent and reason. It implies that appellants are entitled to a learned opinion on the important legal issues raised. That is precisely why they appealed. To refuse this opinion in the face of the Circuit's own precedents was to cut off any hope of the Supreme Court to consider the petitioners' Petition for Writ of Certiorari. It is common knowledge that the business of this Court precludes it from doing the work and carrying the burden of any Circuit Court below.

The text writers on Federal and Supreme Court practice whose expansive and learned works are the result of years of toil have tried vainly to solve for us, whose practice does not lend frequency to appearance before our highest tribunal, the mysteries of "getting the Court's ear" on petitions for Writs of Certiorari. The case at bar cannot possibly fit any of those well-defined categories in the absence of a Circuit Court opinion upon which counsel might raise an important issue of law for argument. One of the paths to the Court's "ear" in the "Daedalian maze of rules" suggested by the informed writers is to demonstrate that the case is important. The importance must not be to an individual, they say, but must be more in the nature of a "class action" so to speak. In the case at issue and others where a Circuit Court of Appeals is faced with the dilemma of distasteful matters of public policy (as in this narcotic case) and the burden of a heavy docket, some fixed rule should be laid down by this Court to protect the rights of defendants, in criminal cases, to a written opinion. Either give every litigant full measure of due process of law by informing him after appeal of the reasons why his liberty should be taken from him or write no opinion at all. We should not permit snap judgments to be injected into our system of jurisprudence.

Chief Justice Hughes made this observation about certiorari in 1937:[4]

> "I think it safe to say that about sixty percent of the applications for certiorari are wholly without merit and ought never to have been made. There are about twenty percent or so in addition which have a fair degree of plausibility, but which fail to survive a critical examination. The remainder falling short of twenty percent show substantial grounds and are granted. I think that (it) is the view of the members of the Court that if any error is made in dealing with these applications it is on the side of liberality."

Certainly this case cannot be considered to have been treated "on the side of liberality." Furthermore, this case cannot be considered to have fallen in the sixty percent as being "without merit." Nothing tangible has issued from the Circuit Court below upon which the requisite needle-point questions of law could be raised to catch this Court's "ear." That certainly was no fault of the petitioners. This case could hardly be said to be within the twenty percent "which have a fair degree of plausibility, but which fail to survive a critical examination." There was no Constitutional or important matter which the petitioners could bring to this court simply because the Circuit Court below made it impossible by the absence of its opinion. Here, again, there was not fault by the petitioners. This case must necessarily in all fairness fall in the coveted twenty percent which calls for review. Petitioners had no fighting chance whatever to be in a position to be eliminated from the other two categories.

Petitioners have constantly complained that the reading of technically worded statutes and indictments to a jury

---

[4] Letter from Chief Justice Hughes to Senator Wheeler, March 23, 1937, reprinted 81st Cong. Rec. 2814-5, (1937).

without more could not result in an intelligently informed jury. Such a jury could not possibly deliberate, they could only speculate to reach a verdict. This court has never decided whether the reading of statutes to a jury constitutes an intelligent charge.

The Fifth, Sixth, and Ninth Circuits have uniformly held that it is reversible error in a criminal case to expect a jury of laymen to be intelligently informed by the reading of technical statutes by the Judge in his charge.[5] No cases to the contrary can be found. The Government to date has declined to argue the point. Yet the Circuit Court of Appeals below ignored its own precedents and those of sister circuits to confirm the conviction in this case without opinion.

---

[5] *Campbell* v. *United States*, 5 Cir., 167 F. 2d 451; *Sandroff* v. *United States*, 6 Cir., 158 F. 2d 623; *Morris* v. *United States*, 9 Cir., 156 F. 2d 925, cited and argued in Petition for Writ of Certiorari, 18-19.

Conclusion

Petitioners pray that the Court reconsider its order of denial and grant their Petition for Writ of Certiorari, or in the alternative direct the Circuit Court of Appeals for the District of Columbia Circuit to issue a written opinion on the questions of law raised below, or in the alternative, direct the Circuit Court of Appeals for the District of Columbia Circuit by a limited written opinion to express its views on the adequacy or the inadequacy of the Trial Judge's charge to the jury to warrant affirmance or reversal of the judgment of conviction.

Respectfully submitted,

JOSEPH J. LYMAN,
Counsel for petitioners,
1424 K Street, N. W.,
Washington 5, D. C.

Of counsel:
JOSIAH LYMAN,
711—14th Street, N. W.,
Washington, D. C.

I hereby certify that this petition for rehearing is presented in good faith and not for purposes of delay, and that the petition is restricted to the argument of substantial grounds available to petitioners but not previously presented.

JOSEPH J. LYMAN,
Counsel for petitioners.

(8852)